SUKUMARAN S/O SUNDRAM

v.

TIMBALAN MENTERI HAL EHWAL DALAM NEGERI MALAYSIA & ANOR & 6 OTHER CASES

HIGH COURT MALAYA, TAIPING
DATO' HJ. ABDUL MALIK BIN HJ. ISHAK J.
[CRIMINAL APPLICATIONS NOS. 44-24-94 TO 44-30-94]
20 DECEMBER 1994

ADMINISTRATIVE LAW: *Habeas Corpus - Preventive detention - Detention orders issued by Deputy Minister of Home Affairs - Validity - Whether in breach of procedural requirement in Emergency (Public Order and Prevention of Crime) Ordinance 1969 - Whether Deputy Minister could sign detention order when it was the Minister who had to be satisfied under s. 4(1) of the ordinance - Liberty of applicants - Whether applicants should be produced before the Court and thereafter be released - Emergency (Public Order and Prevention of Crime) Ordinance 1969 s. 4(1) - Federal Constitution Arts. 5(2), 43A(2) - Perintah Menteri-Menteri Kerajaan Persekutuan 1991 - Criminal Procedure Code s. 365(1)(b) - Rules of the High Court 1980, O. 54 r. 4*

WORDS & PHRASES: *"shall order him to be produced before the Court and release him" - Federal Constitution Art. 5(2) - Whether imperative - Whether only permissive.*

The Deputy Minister of Home Affairs in this case had signed and issued detention orders against the 7 applicants under s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969, and directed that they be detained for a period of two years at the Rehabilitation Centre, Simpang Renggam, Johor. The applicants applied for writ of *habeas corpus* for their release and before the learned Judge the main issues that arose were:

1. Whether it was improper of the Deputy Minister to have signed the detention orders in question when, under s. 4(1) of the 1969 Ordinance, it was the Minister who had to be personally satisfied that the detention was necessary to prevent the applicants from acting in any manner prejudicial to public order.
2. Whether, under Art. 5(2) of the Constitution, if the said writ were to issue, there was a necessity for the applicants to be first produced before the Court for their release.

Held:

[1] What is intended in s. 4(1) of the Ordinance is to confer on the Minister of Home Affairs the power to issue a detention order based on any one of two limbs which should be read disjunctively. The first limb enables the Minister to detain "a person who has acted in any manner prejudicial to public order", while the second limb empowers the Minister to detain "a person if it is necessary for the suppression of violence or the prevention of crimes involving violence".

[2] The Deputy Minister of Home Affairs has the same powers as the Minister of Home Affairs under Art. 43A (2) of the Federal Constitution, and consequently, the Deputy Minister is empowered to act under s. 4(1) of the Ordinance.

[3] One cannot infer here that the Deputy Minister had exercised his personal satisfaction before signing the seven detention orders. The Deputy Minister would not have known the state of mind of the Minister when he signed the seven detention orders under s. 4(1) of the

Emergency (Public Order and Prevention of Crime) Ordinance, 1969. In the context of this case, it would be against commonsense to hold that the Deputy Minister is empowered to sign the detention orders, when he himself did not apply his mind under which limb of s. 4(1) of the Ordinance he was acting. On the face of the seven detention orders, it can be said that the Deputy Minister had acted mechanically in making the respective detention orders. This is a procedural defect that goes to the root of the matter.

[4] The Deputy Minister in exercising his functions under Art. 43A(2) of the Federal Constitution must act as a whole and cannot act partially on behalf of the Minister like what he did in this case. The defect here is very serious and it requires intervention. Once the law is infringed the consequence must follow. The applicants ought to be set to liberty.

[5] There is no necessity to produce the applicants in Court before their release. The words "shall order him to be produced before the Court and release him" appearing in Art. 5(2) of the Federal Constitution are expressed in permissive language. *Prima facie* those words import a discretion and they must be construed as discretionary. In the circumstances there is no necessity to produce the applicants in Court before their release. They ought to be released forthwith.

[Writ of habeas corpus issued. Applicants released forthwith].

Cases referred to:

Wong Fook Nyen v. Timbalan Menteri Dalam Negeri Malaysia & Ors. [1988] 2 CLJ 274 ***(refd)***
Chin Chong Nang v. Menteri Hal Ehwal Dalam Negeri Malaysia dan yang lain [1991] 2 CLJ 1126 ***(refd)***
Carltona, Ltd v. Commissioners of Works and Ors. [1943] 2 ALL ER 560 ***(refd)***
Re Tan Boon Liat @ Allen & Anor. [1977] 2 MLJ 108 ***(refd)***
PP v. Koh Yoke Koon [1988] 2 MLJ 301 ***(refd)***
Tan Hoon Seng v. Minister of Home Affairs, Malaysia and Anor. [1990] 1 MLJ 171 ***(refd)***
Puvaneswaran v. Menteri Hal Ehwal Dalam Negeri Malaysia & Anor. [1991] 3 MLJ 28 ***(refd)***
Ng Hong Choon v. Timbalan Menteri Hal Ehwal Dalam Negeri dan 1 Lagi [1994] CLJ JT(39) ***(refd)***
Kanu Sanyal v. District Magistrate, Darjeeling and Ors. [1973] AIR SC 2684 ***(foll)***
Surinder Singh Kanda v. The Government of the Federation of Malaya [1962] 28 MLJ 169 ***(refd)***
Munusamy v. The Public Services Commission [1960] 26 MLJ 220 ***(cit)***
The Government of the State of Kelantan v. The Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al-Haj [1963] 29 MLJ 355 ***(refd)***
Re Newport Bridge [1859] 2 E. & E. 377, 380 ***(refd)***
Julius v. Bishop of Oxford [1880] 5 App. Cas. 214 ***(refd)***

Legislation referred to:

Criminal Procedure Code, s. 365(1)(b)
Emergency (Public Order and Prevention of Crime) Ordinance, 1969 s. 4(1)
Federal Constitution Art. 43A, 5 cl. (2)
Rules of the High Court, 1980 O. 54 r. 4

For the applicants - Karpal Singh; M/s. Karpal Singh & Co.
For the respondent - Mahmud bin Hj. Abdullah, Federal Counsel.

JUDGMENT

Hj. Abdul Malik bin Hj. Ishak J:

These seven applications for orders of *habeas corpus* were argued together as the issues raise therein were common in all of them.

The Deputy Minister of Home Affairs issued detention orders against the respondents under s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance, 1969 ("the Ordinance") and directed that they be detained for a period of two years each at the Rehabilitation Centre, Simpang Renggam, Johor.

The order in respect of each of the respondents was made by the Deputy Minister of Home Affairs on different days (for Sukumaran s/o Sundram, Partiban a/l Alagoo & Nadarajan a/1 Somasundram on 14 December 1993; for Suresh Raja a/l A. Suranam @ Naraisamy on 15 July 1994; for Mohamed Latiff bin Yusof on 8 February 1994; for Ravichandran a/1 Ramasamy on 7 July 1994; and lastly, for Chan Kam Weng on 29 January 1994) in identical terms but on different facts. Each of the seven orders was in the following terms (a sample is taken from the detention order of Sukumaran s/o Sundram):

> Bahawasanya saya, Menteri Dalam Negeri, berpuas hati yang perintah ini adalah perlu dibuat di atas orang yang namanya tersebut di bawah ini dengan tujuan hendak mencegah beliau daripada melakukan perbuatan dengan apa-apa cara yang memudaratkan ketenteraman awam
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> Nama
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> Sukumaran s/o Sundram
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> Oleh yang demikian, pada menjalankan kuasa yang diberi kepada saya di bawah seksyen 4(1) Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah), 1969, maka saya mengarahkan dengan Perintah ini supaya, orang yang namanya tersebut di atas ditahan selama dua tahun mulai dari 14 haribulan Disember, 1993 di Pusat Pemulihan Akhlak, Simpang Rengam, Johor atau di mana-mana tempat lain sebagaimana yang diarah oleh saya dari semasa ke semasa.
>
> Ditandatangani pada 14 haribulan Disember 1993
>
> t.t
> (Dato' Megat Junnid bin Megat Ayob)
> Timbalan Menteri Dalam Negeri
> Malaysia

It is a correct statement of the law, to say that the act of the Deputy Minister of Home Affairs in making the seven detention orders cannot be questioned further as the same is beyond the purview of challenge on any question save in regard to a question on compliance with any procedural requirement in the Ordinance governing that Act: see s. 7C of the Ordinance.

Flowing from this, Mr. Karpal Singh submits on behalf of the applicants and he says that he is breaking new ground to the effect that the seven detention orders should not be signed by the Deputy Minister of Home Affairs but rather by the Minister of Home Affairs as it was the Minister and not the Deputy Minister that was satisfied under s. 4(1) of the Ordinance in preventing the applicants from acting in any manner prejudicial to public order. He lays emphasis on the words appearing in the detention orders, in particular the following words: "Bahawasanya saya, Menteri Dalam Negeri berpuas hati ....." and submits whether the powers of the Minister and the Deputy Minister are co-extensive. Put simply, he poses several

questions of whether one can exercise the power of the other or can one act partially and the other to act the other part or must one act as a whole under Art. 43A cl. (2) of the Federal Constitution?

For ease of reference, s. 4(1) of the Ordinance is reproduced below:

> If the Minister is satisfied that with a view to preventing any person from acting in any manner prejudicial to public order it is necessary that that person should be detained, or that it is necessary for the suppression of violence or the prevention of crimes involving violence that that person should be detained, the Minister shall make an order (hereinafter referred to as a "detention order") directing that that person be detained for any period not exceeding two years.

From the purely grammatical point of view and considering the normal flow of language, it seems quite clear to me that what is intended in s. 4(1) of the Ordinance is to confer on the Minister of Home Affairs the power to issue a detention order based on any one of two limbs which should be read disjunctively. The first limb enables the Minister of Home Affairs to detain "a person who has acted in any manner prejudicial to public order", while the second limb empowers the Minister of Home Affairs to detain "a person, if it is necessary for the suppression of violence or the prevention of crimes involving violence". These two limbs are quite distinct from one another and since there is no standard form to follow in resorting to s. 4(1) of the Ordinance, the order must be so worded as to show, at least on the face of it, under which particular limb the Minister wishes to apply in detaining the detainee.

It is clear from the authorities that the Deputy Minister of Home Affairs has the same powers as the Minister of Home Affairs pursuant to Art. 43A cl. (2) of the Federal Constitution (*Wong Fook Nyen v. Timbalan Menteri Dalam Negeri Malaysia & Ors.* [1988] 2 CLJ 274 and *Chin Chong Nang v. Menteri Hal Ehwal Dalam Negeri Malaysia dan yang lain* [1991] 2 CLJ 1126) and, consequently, the Deputy Minister of Home Affairs is empowered to act under s. 4(1) of the Ordinance (see *Carltona Ltd v. Commissioners of Works & Ors.* [1943] 2 ALL ER 560, especially at p. 563 where Lord Greene MR said:

> In the administration of government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them).

But, the problem is as posed by Mr. Karpal Singh, can the Deputy Minister act partially and complete the act of personal satisfaction as exercised by the Minister under s. 4(1) of the Ordinance? Translated to the facts of the present application, it would be like this. Can the Deputy Minister sign the seven detention orders when the personal satisfaction (a subjective one) that the applicants had breached the first limb of s. 4(1) of the Ordinance was exercised by the Minister? With respect, surely the Deputy Minister would not know the state of mind of the Minister when he signs the seven detention orders under s. 4(1) of the Ordinance: the state of man's mind is as much a fact as the state of his indigestion. It would be against commonsense to hold that the Deputy Minister is empowered to sign the seven detention orders, in the context of this case, when he himself did not apply his mind under which limb of s. 4(1) of the Ordinance he was acting under. Looking at the seven detention orders it can be said, on the face of it, that the Deputy Minister had acted mechanically in making the respective detention orders. Nothing was done here to dispel the view that the seven detention orders were vague or were passed mechanically by the Deputy Minister.

One cannot infer here that the Deputy Minister had exercised his personal satisfaction before signing the seven detention orders. It is now trite law that the power to detain a person without trial must be expressed, clear and unequivocal and cannot be exercised by sheer inference (*Re Tan Boon Liat @ Allen & Anor*. [1977] 2 MLJ 108, *P.P. v. Koh Yoke Koon* [1988] 2 MLJ 301 and *Tan Hoon Seng v. Minister of Home Affairs, Malaysia and Anor.* [1990] 1 MLJ 171).

There is a procedural defect here that goes to the root of the matter (*Puvaneswaran v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor*. [1991] 3 MLJ 28). The Minister cannot be satisfied if somebody else signed the detention orders on his behalf. The Minister can only be satisfied if he himself signed the detention orders like what he did in Criminal Application 44-32-94. In my judgment, the Deputy Minister in exercising his functions under Art. 43A cl. (2) of the Federal Constitution must act as a whole and cannot act partially on behalf of the Minister like what he did in this case. The defect here is very serious indeed and it requires intervention. Once the law is infringed the consequences must follow and the flood gate argument should not apply.

My attention is drawn to Perintah Menteri-Menteri Kerajaan Persekutuan, 1991 *vide* Gazette notification dated 2 May 1991, Jil. 35, No. 9 where the vast and onerous duties of the Deputy Minister is listed. I do not deny that the Deputy Minister's portfolio is wide but in exercising his powers of detention under s. 4(1) of the Ordinance he must not act mechanically nor breach any of the known procedural defects as set out by the Courts in this country.

For the reasons adumbrated above, I ordered the applicants to be set at liberty forthwith. But this is not the end of the matter. It is said that the applicants should be produced before the Court and thereafter they are to be released. No authority was produced before me for this proposition. In Criminal Application No: 44-31 of 1994, *Mohd. Amin bin Mohd. Yusof v. Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia and Anor*. (unreported decision), I referred to a passage appearing in the decision of the then Supreme Court in the case of *Ng Hong Choon v. Timbalan Menteri Hal Ehwal Dalam Negeri dan 1 Lagi* [1994] CLJ JT(39) where Wan Yahya bin Pawan Teh SCJ (now a senior member of the Federal Court) said:

> It is further ordered that the detainee, Ng Hong Choon be produced forthwith before this Court to be set free.

I am bound by the decision of the then Supreme Court. But, unfortunately, apart from the passage just quoted, the then Supreme Court did not delve into the subject matter at great length.

Section 365(1)(b) of the Criminal Procedure Code (FMS Cap 6) ("CPC") governing the jurisdiction of the High Court in an application for a writ of *habeas corpus* reads as follows:

> The High Court may whenever it thinks fit direct -
>
> (1) that any person who
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> ...
>
> (b) is alleged to be illegally or **improperly** detained in public or private custody within the limits of the Federation, be set at liberty.
> (Emphasis is mine)

It is germane to note that s. 365(1)(b) of the CPC do not lay down the need to produce the detainee in Court before his eventual release.

The old O. 54 of the Rules of the High Court, 1980 ("RHC") which has since been deleted wholly from the RHC (PU(A) 192/93 w.e.f. 1 August 1993) curiously contains r. 4 which makes for interesting reading and it reads as follows:

> Without prejudice to r. 2(1), the Court or Judge hearing an application for a writ of habeas corpus ad subjiciendum may in its or his discretion order that the person restrained be released, and such order shall be a sufficient warrant to any superintendent of a prison or other person for the release of the person under restraint.

All the reported decisions decided before Ng Hong Choon (*supra*) have clearly shown that the detainees were forthwith released without being produced in Courts. Even the British and Americans felt that there was no necessity to produce the prisoners in Court before their release. The same attitude is adopted in India and this is clearly reflected and amplified in *Kanu Sanyal v. District Magistrate, Darjeeling and Ors.* [1973] AIR SC 2684 which was adopted and applied in Criminal Application No: 44-31 of 1994, *Mohd. Amin bin Mohd. Yusof v. Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia and Anor*. (unreported decision).

In *Kanu Sanyal's* case (*supra*), Bhagwati J expressed in strong terms that:

> The inquiry into the legality of the detention can be made and the person illegally detained can be effectively set free without requiring him to be produced before the Court. Why then should it be necessary that the body of the person alleged to be wrongfully detained must be produced before the Court before an application for a writ of habeas corpus can be decided by the Court? Would it not mean blind adherence to form at the expense of substance?

The sentiments expressed by Bhagwati J in *Kanu Sanyal's* case (*supra*) should apply to Malaysia notwithstanding Art. 5 cl. (2) of the Federal Constitution which stipulates that:

> Where complaint is made to a High Court or any Judge thereof that a person is being unlawfully detained the Court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him produced before the Court and release him.

I am aware of the decision of the Judicial Committee of the Privy Council in *Surinder Singh Kanda v. The Government of the Federation of Malaya* [1962] 28 MLJ 169, 171 where Lord Denning said, *inter alia*:

> If there was in any respect a conflict between the existing law and the Constitution ... then the existing law would have to be modified so as to accord with the Constitution ... In a conflict of this kind between the existing law and the Constitution, the Constitution must prevail. The Court must apply the existing law with such modifications as may be necessary to bring it into accord with the Constitution.

But, I hasten to add that great weight should be attached to *Kanu Sanyal's* case (*supra*) as Ong J remarked in *Munusamy v. The Public Services Commission* [1960] 26 MLJ 220, 223: "Although Indian authorities have no binding force they are entitled to great weight ..."

At the end of the day, one must look at the words employed in the Constitution itself in order to interpret it (*The Government of the State of Kelantan v. The Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al-Haj* [1963] 29 MLJ 335). But in so doing one must not forget that:

> Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold set of facts which may arise; and that, even if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. This is where the draftsmen of Act of Parliament have often been unfairly criticised" (*Seaford Court Estates Ltd v. Asher* [1945] 2 KB 461 at p. 498, per Denning LJ).

Thus the words "... shall order him to be produced before the Court and release him" apperaring in Art. 5 cl. (2) of the Federal Constitution are expressed in permissive language as it was meant for the purpose of enabling something to be done (Maxwell on *Interpretation of Statutes*, 12th edn. by P.St.J. Langan at pp. 234-235, 280-281). *Prima facie* those words import a discretion and they must be construed as discretionary because, firstly, there is nothing in the subject matter to show that they are meant to be imperative (*Re Newport Bridge* [1859] 2 E. & E: 377, 380 and *Julius v. Bishop of Oxford* [1880] 5 App. Cas. 214, 222), and secondly, before the old O. 54 of the RHC that was totally deleted on 1 August 1993, Art. 5 cl. (2) of the Federal Constitution was already in existence, yet Malaysian Judges before me except *Ng Hong Choon* (*supra*) saw it fit to release the detainees without requiring their attendance.